

**United States Department of Labor
Employees' Compensation Appeals Board**

R.H., Appellant)	
)	
and)	Docket No. 18-1721
)	Issued: March 25, 2019
)	
DEPARTMENT OF ENERGY, BONNEVILLE)	
POWER ADMINISTRATION, Kent, WA,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 13, 2018 appellant, through counsel, filed a timely appeal from a July 24, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than two percent binaural hearing loss, for which he previously received a schedule award.

FACTUAL HISTORY

On July 1, 2015 appellant, then a 57-year-old substation electrician, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss causally related to factors of his federal employment. He attributed his condition to working in a noisy environment for 25 years. Appellant's supervisor indicated that on August 12, 2015 appellant had been in a hearing conservation program and had been exposed to noise from equipment and tools in the performance of his job duties. He further noted that appellant had been provided with earplugs, earmuffs, and other personal protective equipment.

On October 27, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Julie Gustafson, a Board-certified otolaryngologist. In her November 12, 2015 report, Dr. Gustafson examined appellant due to his history of hearing loss with tinnitus. She noted that appellant's tinnitus was a continuous hum in both ears which interrupted his ability to fall asleep at night, to read, or to concentrate. Appellant used music to mask the humming. Dr. Gustafson found that appellant's tinnitus mildly interfered with his activities of daily living. She noted appellant's history of noise exposure and reviewed his audiogram. Appellant's November 12, 2015 audiogram demonstrated testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hertz (Hz) revealed in the following: right ear 20, 25, 25, and 35 decibels, respectively and on the left 15, 20, 25, and 30 decibels, respectively. Dr. Gustafson diagnosed noise-induced hearing loss and tinnitus. She attributed these conditions to his significant history of noise exposure at work. Dr. Gustafson applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)³ and found no ratable loss of hearing in the left ear, 1.875 percent loss of hearing in the right ear, and binaural hearing loss of .31 percent. She further recommended two percent binaural hearing loss due to tinnitus which interfered significantly with activities of daily living, including his ability to concentrate and read in quiet, as well as consistently being able to initiate sleep.

By decision dated December 23, 2015, OWCP accepted appellant's occupational disease claim for binaural hearing loss and binaural tinnitus. On February 28, 2017 appellant retired from the employing establishment.

On November 15, 2017 appellant, through counsel, requested a schedule award and submitted additional evidence. He provided a hearing loss worksheet and calibration certificates. Dr. Juan Carlos Garza, a Board-certified family practitioner, completed a note on February 18, 2016 diagnosing severe hearing loss and recommended hearing aids.

On December 4, 2017 Dr. Jeffrey M. Israel, a Board-certified otolaryngologist acting as an OWCP district medical adviser (DMA), reviewed appellant's medical record and a statement of accepted facts (SOAF) dated October 23, 2015. He agreed that appellant had a noise-induced

³ A.M.A., *Guides* (6th ed. 2009).

sensorineural hearing loss due to his employment-related noise exposure and determined that appellant had reached maximum medical improvement (MMI) on November 12, 2015, the date of his most recent audiogram. Dr. Israel further found that appellant had a right monaural hearing loss of hearing of 1.875 percent and a nonratable loss of hearing on the left. He also opined that appellant had an additional two percent loss of hearing due to tinnitus for a combined total of 2.3 percent binaural hearing loss.

On February 6, 2018 appellant filed a claim for a schedule award (Form CA-7).

By decision dated February 20, 2018, OWCP granted appellant a schedule award for two percent binaural hearing loss. The award ran from November 12 to December 9, 2015, for a total of 28 days of compensation.

On February 27, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. Appellant provided an additional audiogram dated August 30, 2018 and a tinnitus handicap inventory he had completed on December 21, 2017.

During the oral hearing, held on June 20, 2018, counsel contended that neither the August 30, 2016 audiogram, nor the tinnitus handicap inventory had been considered by OWCP when assessing the extent of appellant's permanent hearing loss. The hearing representative noted that these documents had not been certified by a physician, as an audiologist was not considered a physician under FECA.

By decision dated July 24, 2018, OWCP's hearing representative found that appellant had no more than two percent binaural hearing loss for which he previously received a schedule award. She found that as the additional audiogram had not been reviewed by a Board-certified otolaryngologist, it was not probative medical evidence.

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. For decisions issued after May 1, 2009 OWCP began using the sixth edition of the

⁴ 5 U.S.C. §§ 8101-8193, 8107.

⁵ 20 C.F.R. § 10.404.

A.M.A., *Guides*.⁶ The Board has approved OWCP's use of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁷

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.⁸ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are added up and averaged. Then, the fence of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.⁹ The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss, the lesser loss is multiplied by five and then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.¹⁰

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.¹¹ If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.¹²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than two percent binaural hearing loss, for which he previously received a schedule award.

OWCP properly referred appellant to Dr. Gustafson for a second opinion examination relative to his hearing loss.¹³ Dr. Gustafson's November 12, 2015 report related appellant's audiogram findings and concluded that appellant's binaural hearing loss was due to his workplace noise exposure. She determined that appellant had no ratable hearing loss in the left ear, 1.875 percent hearing loss in the right ear, and binaural hearing loss of .31 percent. Dr. Gustafson further recommended an additional two percent binaural hearing impairment due to tinnitus.

⁶ A.M.A., *Guides* (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ *A.G.*, Docket No. 17-1778 (issued December 18, 2018); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

⁹ *See supra* note 3 at 250 (6th ed. 2009).

¹⁰ *Id.*

¹¹ *See id.* at 249 (6th ed. 2009).

¹² *Id.*

¹³ *Id.*

On December 4, 2017 a DMA reviewed Dr. Gustafson's report and concurred with her findings and conclusions. Testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 20, 25, 25, and 35, respectively. These decibels were totaled at 105 and were divided by 4 to obtain an average hearing loss at those cycles of 26.25 decibels. The average of 26.25 decibels was then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 1.25 which was then multiplied by 1.5 to equal 1.875 percent hearing loss for the right ear.¹⁴

Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed decibel losses of 15, 20, 25, and 30, respectively. These decibels were totaled at 90 and were divided by 4 to obtain the average hearing loss at those cycles of 22.5 decibels and then reduced by 25 decibels to compute 0 percent hearing loss for the left ear. Although he has accepted employment-related hearing loss on the left, it is not sufficiently severe to be rated as a monaural loss for schedule award purposes.¹⁵ OWCP's DMA then multiplied the 0 percent monaural loss for the left ear by 5, added the 1.875 percent right ear monaural hearing loss, divided the total by 6 as directed by the A.M.A., *Guides*, resulting in 0.3125 percent binaural hearing loss.¹⁶ He further found that appellant had an additional two percent binaural loss of hearing due to tinnitus for a total binaural impairment rating of two percent.

Appellant also submitted an August 30, 2018 audiogram. However, this audiogram does not constitute probative medical evidence because it was not certified by a physician as being accurate. The Board has held that, if an audiogram is prepared by an audiologist, it must be certified by a physician as being accurate before it can be used to determine the percentage of hearing loss.¹⁷

The Board finds that there is no current medical evidence of record supporting ratable hearing loss greater than the two percent binaural hearing loss previously awarded. It is appellant's burden of proof to submit evidence of additional hearing loss under OWCP's standardized procedures for rating hearing impairment.¹⁸ He has not submitted such evidence in support of his claim.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment.

¹⁴ The Board notes OWCP's policy to round the calculated percentage of impairment to the nearest whole number. See *J.H.*, Docket No. 08-2432 (issued June 15, 2009); *Robert E. Cullison*, 55 ECAB 570 (2004). See also Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(b) (January 2010).

¹⁵ *Supra* note 11.

¹⁶ *W.C.*, Docket No. 18-0290 (issued July 13, 2018).

¹⁷ See *L.H.*, Docket No. 18-0696 (issued November 28, 2018); *Joshua A. Holmes*, 42 ECAB 231 (1990).

¹⁸ *J.W.*, Docket No. 17-1339 (issued August 21, 2018); *J.B.*, Docket No. 15-1474 (issued March 4, 2016).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than two percent binaural hearing loss, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board